

VOL 2062

CR-02-0327

COURT OF CRIMINAL APPEALS NO.

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF Montgomery COUNTY, ALABAMA

CIRCUIT COURT NO. CC-02-920

CIRCUIT JUDGE Yruman Hobbs

Type of Conviction / Order Appealed From: Robbery I

Sentence Imposed: 20 yrs.

Defendant Indigent: ☒ YES ☐ NO

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Charles Smith
NAME OF APPELLANT

STATE OF ALABAMA

(State represented by Attorney General)

NAME OF APPELLEE

NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below.

(For Court of Criminal Appeals Use Only)

A

1 stop signs doing at least fifty miles an hour or
2 so.

3 Q. And during this time -- during this time,
4 as best as you can recall, were there other
5 vehicles out there --

6 A. (Witness nods.)

7 Q. -- or -- go ahead and answer.

8 A. I understand. No traffic whatsoever.

9 Q. No traffic?

10 A. No traffic.

11 Q. And it was after midnight?

12 A. Yes, sir.

13 Q. And you said the county -- there was a --
14 was the county sheriff involved in this
15 coordination?

16 A. No, sir, he wasn't. The county, they
17 also sometimes will listen to our radio traffic.
18 Hackle Drive was right up to the Northern
19 Boulevard. And what the county did -- unit did,
20 they positioned themselves right there at Hackle
21 and the Northern Boulevard, so it was about a block
22 down from where he eventually stopped. But he was
23 blocking the street at that point. And that's when
24 he pulled over. He simply pulled onto Hackle and
25 he saw it was blocked.

1 Q. And -- and you said you exited your car
2 and immediately drew your firearm, right?

3 A. Yes, sir.

4 Q. And you ordered him to get out of the
5 car?

6 A. Yes, sir.

7 Q. And you said there was some hesitation?

8 A. Yes, sir.

9 Q. What was he doing?

10 A. I couldn't -- I couldn't quite see
11 because the windows are somewhat a light tint,
12 light enough to where I couldn't quite see.

13 Q. But -- about how many seconds expired
14 before he came out?

15 A. I would say five to six seconds.

16 Q. And that's not -- that's not a long time,
17 is it?

18 A. When you're in a situation like that, it
19 seems like an eternity, yes, sir.

20 Q. People react that way, you know -- you've
21 been an officer for over three years, right?

22 A. Uh-huh.

23 Q. People sometimes hesitate, because
24 they're afraid, don't they?

25 A. Some situations they may.

1 Q. If you seen ten, fifteen police cars
2 converging on a scene, you might --

3 A. From my experience, if -- when ten,
4 fifteen, you know, patrol cars are converging on
5 one person, generally they cooperate right away.
6 He was hesitant to cooperate right off the bat.

7 Q. Okay. But he was coming out?

8 A. Eventually, yes, sir, he did. He raised
9 his hand and did come out cooperative,

10 Q. After -- after his arrest was secured,
11 how long -- you testified, did you not, that you
12 searched the jeep; isn't that correct?

13 A. Yes, sir.

14 Q. And how long did it take you to search
15 that jeep after his arrest was secured?

16 A. Well, that was the very first part that I
17 hit was the driver's seat. Generally, when I
18 search a vehicle, I'll start off in a circular
19 pattern, and I'll start with the driver's seat
20 area. That was the very first section I searched
21 was there. And, immediately, upon seeing that bank
22 bag, I just backed out of the vehicle and secured
23 it and waited for a detective to arrive on scene.

24 Q. Did you -- how many -- do you recall how
25 many cars were behind you or eventually came upon

1 that?

2 A. Eventually maybe two or three.

3 Q. Did they -- did there come a time that
4 some units searched the streets?

5 A. Searched the streets?

6 Q. Yes. The streets that where this chase?

7 A. During that time, I didn't -- I wasn't
8 aware of anything until I -- until we came to our
9 headquarters. Maybe about an hour later, I was
10 aware that a couple of units did go out and search
11 the street.

12 Q. And when was that?

13 A. That was -- I'm assuming it was right
14 after the chase.

15 Q. And did they find anything?

16 A. Yes, they did. But to what they found, I
17 don't know. I didn't stick around, because, at the
18 time, I was -- I just did my statement for what
19 part I did, and I left headquarters. I didn't
20 stick around to find out exactly what they found or
21 where they found it at.

22 Q. And you said you found an Arby's bag in
23 the jeep?

24 A. Yes, sir.

25 Q. Was it a leather bag or --

1 A. Excuse me?

2 Q. Was it a leather or a paper bag?

3 A. No. It was the plastic bag that was in
4 the exhibit.

5 Q. Plastic bag?

6 A. Yes, sir.

7 Q. And when you discovered that plastic bag,
8 were you the -- were you the sole person involved
9 in that searching of the vehicle?

10 A. Yes, sir.

11 Q. There was no one else around?

12 A. No, sir -- there was other people around
13 the vehicle, but nobody else was searching the
14 vehicle with me.

15 Q. Did you -- did you say to anyone that
16 here, you know, I found this bag here?

17 A. Oh, I told the supervisor right on scene.
18 And then I told everybody else just to -- just to
19 leave the vehicle alone and wait for the
20 detectives, and I secured it.

21 Q. You -- you said you didn't find any gun?

22 A. No, sir, I did not.

23 Q. While -- and I think you testified that
24 while you were pursuing --

25 (Juror's telephone rings.)

1 Q. I believe you said while you were
2 pursuing, you did not -- or you could not, if you
3 wanted, to observe anything that was being thrown
4 from the car --

5 A. Yes, sir.

6 Q. -- the jeep? How close -- at any given
7 time, how close were you to the jeep?

8 A. Due to the speeds, I usually hang back a
9 little bit on the speeds. The closest I probably
10 was, within him, was probably maybe forty yards.
11 The furthest I got back was maybe sixty yards.

12 Q. And forty yards would be what, about five
13 times this court -- the length of this courtroom?

14 A. About three times.

15 Q. Three times?

16 A. Three times the length of this courtroom.

17 Q. And if someone was tossing something out,
18 is it impossible to see it that they were throwing
19 something out?

20 A. If it was in a well-lit area, possibly
21 yes. But the road that I was on -- that we were
22 traveling on, it was -- it was dark.

23 MR. DURANT: Okay. That's all.

24 MR. POWELL: Nothing --

25 MR. DURANT: Let me ask one more

1 question.

2 Q. Is your vehicle equipped with any kind of
3 camera?

4 A. Yes, sir, it is.

5 Q. Okay. Is that -- was your camera working
6 on that evening?

7 A. Yes, sir, it is.

8 Q. Did it -- did it make a tape of this
9 chase?

10 A. Yes, sir, it did.

11 Q. Did you turn that over to the District
12 Attorney?

13 A. No, sir. I don't have the tape with me.
14 It's down at impound.

15 Q. But the tape would have the entire
16 transaction?

17 A. Yes, sir, it would.

18 MR. DURANT: That' all. Thank you.

19 THE COURT: Anything else?

20 MR. POWELL: Nothing further.

21 THE COURT: Okay. You're excused.

22 (Witness excused.)

23 THE COURT: Your next witness?

24 MR. POWELL: We'll call Corporal
25 Roberts.

1 THE COURT: If you'll have a seat
2 right over there.

3 CORPORAL THOMAS E. ROBERTS

4 The witness, having first been duly sworn or
5 affirmed to speak the truth, the whole truth, and
6 nothing but the truth, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. POWELL:

9 Q. Could you state your name for the jury?

10 A. Corporal Thomas E. Roberts.

11 Q. And how are you employed,
12 Corporal Roberts?

13 A. With the Montgomery Police Department,
14 K-9 Division.

15 Q. And is that what you were doing back in
16 April of this year?

17 A. Yes, sir.

18 Q. Now, were you ever called out to the
19 vicinity of the Arby's and Gunter Park off the
20 Bypass on -- in April this year?

21 A. Yes, sir, I was.

22 Q. On April 28th, specifically?

23 A. I believe that was the date, sir.

24 Q. What was your assignment?

25 A. They had a -- Arby's on Atlanta Highway

1 had been robbed. They had a pursuit that took a
2 route down Gunter Park. They called us up to
3 attempt to locate any type of evidence that wasn't
4 found at the scene.

5 Q. Was there anything in particular you were
6 looking for?

7 A. Uh, either looking for a pistol that had
8 possibly been thrown out the vehicle or I believe
9 that they had bank bags that had been taken from
10 the business.

11 Q. And how -- describe for the jurors how
12 your search --

13 A. Well, initially, I went west down Gunter
14 Park Drive. I got about maybe two-or three-hundred
15 yards on Gunter Park Drive. I looked off to my
16 left-hand side, and I observed, I believe, one bank
17 bag. One of the bags was laying on the roadway
18 just by the curve. There was another one that was
19 laying approximately five feet from it. I stopped
20 my vehicle and got out. On one of the bank bags,
21 it had been -- it had wrote Arby's on the bank bag.
22 I made a little canvas of the area right there.
23 Within about ten more feet, I located a SouthTrust
24 bank bag that had Arby's written on it also.

25 Q. Now, I'm going to show you State's 15.

1 Do you recognize that?

2 A. Yes, sir, I do.

3 Q. What is it?

4 A. That's going to be clear bags that --
5 with this one over here with Arby's wrote on the
6 bank bag.

7 Q. Okay. And you say you saw those --

8 A. Yes, sir.

9 Q. -- on the side of the road?

10 A. Yes, sir. They were -- this is the
11 roadway here and there's the curve and there's the
12 bags right there in relation to the road.

13 Q. And is this a fair and accurate depiction
14 of where you saw those bank bags that night?

15 A. Yes, sir, it is.

16 MR. POWELL: We offer State's 15.

17 THE COURT: Admitted.

18 (State's Exhibit No. 15 was admitted
19 into evidence.)

20 Q. Now, where exactly is State's 15? What
21 road is this?

22 A. That's going to be Gunter Park Drive
23 about -- off of Congressman Dickinson, that's going
24 to be about two-hundred yards down on Gunter Park
25 Road right before the curve.

1 Q. Now, this is a rough -- very rough
2 drawing. But that's Congressman Dickinson right
3 there. It has the boulevard and Gunter Park.

4 A. Yes, sir.

5 Q. Draw for me -- and it doesn't have to be
6 exact --

7 A. This is going to be -- what street is
8 this right here?

9 Q. I'm using my big map. This would go
10 right here like this, just like that.

11 Now, does that orientate -- orient you a
12 little better?

13 A. Yes, sir, it does.

14 Q. Okay. Now, about where did you find the
15 bank bags?

16 A. This is the initial stop sign right here.
17 That's east and west Gunter Park right there.

18 Q. Okay.

19 A. So it's going to be -- this is the stop
20 sign. It's going to be, approximately, right in
21 that area. It was just past the stop signs just
22 past the curve -- the initial curve.

23 Q. Could you initial that?

24 A. (Witness complies.)

25 MR. POWELL: And I'm going to mark

1 this -- I believe, it's going to be State's 23,
2 Your Honor.

3 Q. And except for the fact that that's not
4 to scale, does that roughly show the intersection
5 of the boulevard, Congressman Dickinson and the
6 Gunter Park area?

7 A. Yes, sir.

8 MR. POWELL: We offer State's 23,
9 Judge.

10 THE COURT: Admitted.

11 (State's Exhibit No. 23 was admitted
12 into evidence.)

13 Q. Now, I'm just showing -- you didn't
14 actually collect the bank bags?

15 A. No, sir. I stayed there with the bank
16 bags until the detectives got there to process
17 them.

18 Q. Okay. Did you discover any other
19 evidence at this scene searching the park?

20 A. Just them clear bags and the SouthTrust
21 bank bag that was located about ten feet from that.

22 Q. Now, I'm showing you State's 17. Do you
23 recognize that?

24 A. Yes, sir.

25 Q. What is it?

1 A. That's one of the bags that was found
2 over at -- off of Gunter Park Drive that night.

3 Q. State's 21, do you recognize that?

4 A. Yes, sir, that was the one that was
5 found, approximately, ten feet from the other two
6 bags that were located by the roadway.

7 Q. And State's 18?

8 A. Yes, sir, that was the other one that was
9 found by the roadway.

10 Q. And, finally, State's 20?

11 A. Yes, sir.

12 Q. These were the type of bank bags you
13 found out there that night?

14 A. Yes, sir.

15 MR. POWELL: Have I offered State's
16 14 and 15?

17 THE COURT REPORTER: I don't have
18 it.

19 MR. POWELL: Okay. Your Honor, at
20 this time, we offer State's 14 and 15 --

21 THE COURT: Admitted.

22 MR. POWELL: -- the photographs of
23 the bags.

24 (State's Exhibits No. 14 and 15 were
25 admitted into evidence.)

1 MR. POWELL: That's all I have,
2 Judge.

3 CROSS-EXAMINATION

4 BY MR. DURANT:

5 Q. Corporal Roberts, who directed you to
6 search this area?

7 A. Who directed me to search the area? Uh,
8 one of our supervisors --

9 Q. Okay.

10 A. -- in the K-9 Division, sir.

11 Q. Do you know how long after the -- this
12 so-called chase, how long was it before you went
13 out there to --

14 A. Well, a -- I'm guessing -- just estimate
15 would probably be within a couple of minutes.
16 Initially, when the call went out -- I mean, we all
17 ride over that area in case the suspect flees or --
18 so I was already en route to the area prior to the
19 pursuit taking place. As soon as the robbery -- we
20 answer all the calls that go out on any robberies
21 in the city, so I was already en route over there.
22 But I'm guessing probably about maybe five
23 minutes --

24 Q. All right.

25 A. -- after the pursuit had ended.

1 Q. And did you have -- did you have any
2 difficulty finding any of these bags?

3 A. No, sir.

4 Q. Do you -- you were -- were you aware --
5 were you aware that the ground that was canvassed
6 that evening from the time that, you know, they
7 left the Arby's to -- up to Hackle Drive, you knew
8 what --

9 A. Yes, sir, I knew what was going on over
10 the radio. I could hear the pursuit going --

11 Q. And that's about -- could you give a
12 rough estimate as to how many miles that would be?

13 A. From the business --

14 Q. Yes.

15 A. -- of Arby's to Hackle Drive?

16 Q. Yes.

17 A. I mean, I --

18 Q. Well, it's several blocks?

19 A. Yes, sir, about -- I would say several --
20 several blocks.

21 Q. Twenty or thirty blocks?

22 A. Probably.

23 Q. But when you got up there, you weren't --
24 you weren't able to locate these items immediately?

25 A. Yes, sir.

1 Q. What did you use to assist you in?

2 A. I didn't need anything to assist me
3 initially. I had seen both them bank bags sitting
4 off the roadway. It was under a clear lighted area
5 over off Gunter Park. So I could see them in plain
6 view from the roadway.

7 Q. Okay. So there was some light out there?

8 A. Yes, sir.

9 Q. There was some light. You wouldn't say
10 it was dark out there, would you?

11 A. No, sir. Of course, that's not a
12 well-traveled road. I believe the incident
13 happened around 12:40, 12:45 in the morning, so --
14 and that particular drive, there's not much vehicle
15 traffic that goes down there.

16 Q. If you were behind a -- if you were
17 behind a car and someone were -- and someone was to
18 toss some bags out of a window, what's the
19 likelihood that you would see that kind of motion
20 or that kind or hand action?

21 MR. POWELL: Your Honor, I'm going
22 to object. It calls the witness to speculate.

23 THE COURT: Sustained.

24 Q. But all of these bags, according to your
25 testimony on direct, were in the -- in close

1 proximity of each other; is that correct?

2 A. Yes, sir.

3 Q. Is that -- I think in one of your
4 statements you said that it was -- well, in fact,
5 approximately, ten feet from the bank bag, there
6 were several other smaller plastic bags?

7 A. Approximately so, yes, sir.

8 Q. When you got out of your vehicle, did you
9 know what it was right away?

10 A. Initially?

11 Q. Yes.

12 A. No, sir, I didn't.

13 Q. Okay. You got out of your vehicle and
14 then examined what you saw?

15 A. Yes, sir.

16 Q. Did you also see a mask out there?

17 A. No, sir, I didn't. When I located the
18 evidence, I stood beside the evidence until the
19 detectives come out to process for the chain of
20 custody of the evidence.

21 Q. And you were told by your supervisor to
22 search out there?

23 A. Yes, sir.

24 Q. You did not observe anyone throw anything
25 out there?

1 A. No, sir.

2 Q. These were -- these were bags out there
3 just as animated as they could be, just sitting
4 there, right?

5 A. They were sitting off the roadway, yes,
6 sir.

7 Q. They were sitting off the -- off of --
8 off of Gunter Loop Road; is that correct?

9 A. Yes, sir -- Gunter Park --

10 Q. Gunter Park Drive. I'm sorry.

11 A. And, it -- I mean, it's normaly common
12 practice when we have any type of pursuit that
13 someone always backtracks that area. It just
14 wasn't that I picked Gunter Park Drive out of the
15 blue. That's one of the roads that the pursuit had
16 taken. Initially, when they stop the vehicle, then
17 we always -- I mean, it's almost common practice --
18 it's just when we're dealing with people that have
19 any type of evidence that they could be wanting to
20 get rid of it, so we --

21 Q. And intravacking -- and in traversing
22 that area, you didn't find a weapon?

23 A. No, sir, I did not find a weapon.

24 Q. You were told to look for a weapon also,
25 is that --

1 A. Evidence, a weapon, some -- something,
2 yes, sir.

3 Q. And if a weapon was thrown out there, you
4 would have found it, right?

5 A. I --

6 Q. A lieutenant officer as you are, you
7 would have found it, right?

8 MR. POWELL: Objection, Judge.
9 Argumentative.

10 THE COURT: Sustained.

11 MR. DURANT: That's all.

12 MR. POWELL: Nothing further.

13 THE COURT: You can step down and
14 you're excused.

15 (Witness excused.)

16 THE COURT: Your next witness?

17 MR. POWELL: State calls
18 Corporal Higgins.

19 THE COURT: And if you would raise
20 your right hand.

21 SERGEANT MATTHEW HIGGINS

22 The witness, having first been duly sworn or
23 affirmed to speak the truth, the whole truth, and
24 nothing but the truth, testified as follows:

25 DIRECT EXAMINATION

1 BY MR. POWELL:

2 Q. Could you state your name for the jury?

3 A. Sergeant Matthew Higgins.

4 Q. Now, Sergeant Higgins, how are you
5 employed?

6 A. City of Montgomery Police Officer.

7 Q. And back in April, how were you employed?

8 A. I was with the K-9 Bureau, Montgomery
9 Police Department as a Corporal.

10 Q. And what's your partner's name?

11 A. Smokey.

12 Q. Now, what -- were you and Smokey called
13 out to a crime scene to the vicinity of Gunter Park
14 involving an Arby's restaurant?

15 A. Yes, sir.

16 Q. Describe for me the circumstances of you
17 going out to Gunter Park.

18 A. I was en route to the area during a
19 pursuit as a backup unit. Before I arrived, the
20 suspect had been taken into custody. And we were
21 asked to go out to attempt to locate some evidence.

22 Q. Did you just pick a road?

23 A. No, sir. It was the path that had been
24 taken by the officers in the pursuit.

25 Q. And you were directed to the specific

1 location?

2 A. Yes, sir.

3 Q. How did you go about searching the area?

4 A. Basically, my partner is trained in
5 evidence recovery. And both he and I got out, and
6 I put him on lead and we began walking the roadway
7 out at Gunter Park in an attempt to locate
8 evidence.

9 Q. Were you looking for anything in
10 particular?

11 A. A weapon, particularly.

12 Q. Okay. Did you find a weapon?

13 A. No, sir, I did not.

14 Q. You were unable to locate any type of
15 weapon?

16 A. No, sir.

17 Q. Okay. Did the dog hit on anything?

18 A. Yes, sir.

19 Q. What?

20 A. At the corner of Gunter Park and
21 Congressman Dickinson, my partner located a
22 toboggan and some type of dark-colored clothing --
23 cloth.

24 Q. Okay. I'm showing you State's 23. It's
25 a rough map, though it's not to scale of the area

1 of the Boulevard and Congressman Dickinson.' Do you
2 recognize that area?

3 A. Yes, sir.

4 Q. Could you basically draw for me where you
5 located the evidence you just described?

6 A. Okay. Taking it, this is Congressman
7 Dickinson here --

8 Q. Correct. Could you label that for me on
9 State's 23?

10 A. (Witness complies.) Yes. It's going to
11 be in the roadway, so it would be kind of hard, but
12 it would be --

13 Q. Just draw a circle.

14 A. It would be -- it would be right in that
15 area there.

16 Q. Could you initial that for me?

17 A. Yes, sir. (Witness complies.)

18 MR. POWELL: We reoffer State's 23
19 with Sergeant Higgins' modification, Judge.

20 THE COURT: Admitted.

21 (State's Exhibit No. 23 we
22 readmitted into evidence with
23 modification.)

24 Q. Now, what did you find at that location?

25 A. It would be a toboggan, a knit -- like, a

1 ski cap and a dark-colored piece -- piece of cloth.

2 Q. I'm showing you State's 13. Do you
3 recognize that?

4 A. Yes, sir.

5 Q. What's that?

6 A. That would be the two items that my
7 partner located at the corner of Congressman
8 Dickinson and Gunter Park.

9 Q. And does that photograph show exactly
10 where they were located?

11 A. Yes, sir, it does. It was -- we didn't
12 pick it up or anything. It was left right there
13 until the detective arrived.

14 Q. And is that fair and accurate?

15 A. Yes, sir, it is.

16 MR. POWELL: We offer State's 13.

17 THE COURT: Admitted.

18 (State's Exhibit No. 13 was admitted
19 into evidence.)

20 Q. Now, I'm going to show you what I've
21 marked as State's 16, and ask you to take a look at
22 that for me. Do you recognize that?

23 A. Yes, sir.

24 Q. What is that?

25 A. That's the piece of -- the piece of cloth

1 that was laying there with the ski -- the toboggan
2 hat.

3 Q. Now, does that appear to be in the same
4 or substantially the same condition as the night
5 you recovered it --

6 A. Yes, sir.

7 Q. -- or you saw it?

8 A. Yes, sir.

9 MR. POWELL: We offer State's 16,
10 Judge.

11 THE COURT: Admitted.

12 (State's Exhibit No. 16 was admitted
13 into evidence.)

14 Q. Now, did you actually pick this item up?

15 A. No, sir. It was left there until
16 Detective arrived to retrieve it.

17 Q. Okay. And did you stand there with --

18 A. Yes.

19 Q. -- what's shown in State's 13 --

20 A. Yes.

21 Q. -- the ski mask -- or the mask with the
22 holes cut in it --

23 A. Yes.

24 Q. -- until the Detective arrived to collect
25 it?

1 A. Yes, sir, I did.

2 Q. And did anybody come and do anything to
3 any of the evidence --

4 A. No, sir.

5 Q. -- while you were there?

6 A. No.

7 Q. It was just you and your dog?

8 A. Yes, sir.

9 Q. Did you find any other evidence out there
10 on the scene?

11 A. No, sir, just that.

12 MR. POWELL: I think that's
13 everything I have for Sergeant Higgins.

14 CROSS-EXAMINATION

15 BY MR. DURANT:

16 Q. Officer Higgins --

17 A. Sir?

18 Q. -- you were looking for a weapon in
19 particular; is that correct?

20 A. Yes, sir.

21 Q. And you went -- you went over the entire
22 course; is that correct?

23 A. We walked Gunter Park and Congressman
24 Dickinson where we located those items, and that's
25 where we stopped.

1 Q. You stopped there?

2 A. Yes, sir.

3 Q. Why did you stop there?

4 A. Once we located that evidence, it's my
5 responsibility to secure it until somebody comes
6 there to retrieve it.

7 Q. Okay. But you terminated your search for
8 a weapon?

9 A. Sir?

10 Q. You terminated the search for a weapon at
11 that time?

12 A. I did, my part, yes, sir.

13 Q. And you were convinced that there were no
14 weapons around that area?

15 A. The area that I had walked with my
16 partner, yes, sir.

17 Q. You didn't see any -- you didn't --
18 you -- obviously, you didn't see anyone throw these
19 items out of a -- out of a moving vehicle or
20 anything like that, did you?

21 A. No, sir. I was called after the fact.

22 Q. Okay. And you don't know how long these
23 items were out on the roadway, do you?

24 A. No, sir.

25 Q. And you -- what did you -- what did you

1 recover that evening -- or that morning -- 'early
2 morning? A toboggan, you said?

3 A. Yes, sir.

4 Q. What did that look like?

5 A. It's like a knit hat.

6 Q. Okay. A knit hat?

7 A. Yes, sir.

8 Q. And you also recovered a dark-colored
9 piece of cloth with the --

10 A. -- holes cut in it.

11 Q. Did the Detective take -- secure the
12 toboggan -- did he take those with him?

13 A. Yes, sir.

14 Q. And the dark-colored piece of cloth?

15 A. Yes, sir.

16 Q. Those were the two pieces that you found?

17 A. Yes, sir.

18 MR. DURANT: That's all.

19 MR. POWELL: Nothing further, Judge.

20 THE COURT: You can step down and
21 you're excused.

22 (Witness excused.)

23 MR. POWELL: Your Honor, Detective
24 Butterbaugh is going to be my last witness, but he
25 may take ten -- fifteen to twenty minutes. Do we

1 want to take a break?

2 THE COURT: We can start -- does
3 anybody need to take a break?

4 (No response.)

5 THE COURT: You can start.

6 MR. POWELL: Okay.

7 DETECTIVE C. J. BUTTERBAUGH

8 The witness, having first been duly sworn or
9 affirmed to speak the truth, the whole truth, and
10 nothing but the truth, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. POWELL:

13 Q. Could you state your name for the jury?

14 A. Detective C. J. Butterbaugh.

15 Q. And how are you employed, Detective
16 Butterbaugh?

17 A. I'm a homicide investigator with the City
18 of Montgomery.

19 Q. Okay. Now, what is the distinction
20 between your designation as Detective versus the
21 K-9 officers we just heard from or the patrol
22 officers we just heard from?

23 A. Different divisions within a police
24 officer that he would have different aspects of the
25 police work.

1 Q. Describe the -- the division of labor,
2 so-to-speak, for the jury.

3 A. K-9 officers do more searches and -- such
4 as with the animal drug searches, drug
5 identification, building searches, searching for
6 evidence while detectives actually do
7 investigations into the crimes committed.

8 Q. Versus -- what are the primary function
9 as a patrol unit?

10 A. Patrol officers are initial responders.
11 They handle the initial on the scene, such as we
12 have today. They handle initial duties at a scene,
13 help apprehend suspects as in this case.

14 Q. So once a patrol had secured the scene,
15 so-to-speak, the K-9's did their search, then you
16 come in and follow-up with the investigation?

17 A. Yes.

18 Q. Now, where was the first place you went
19 regarding this -- first of all, this is a robbery
20 of the Arby's?

21 A. Yes, sir.

22 Q. On Atlanta Highway?

23 A. Yes.

24 Q. Back in April?

25 A. Yes, sir.

1 Q. 28th?

2 A. Yes, sir.

3 Q. Did all that occur here in Montgomery
4 County?

5 A. Yes, it did.

6 Q. Now, where was the first place you went
7 in response to this investigation?

8 A. Well, after leaving headquarters, I
9 initially drove to the Arby's. I saw another
10 Detective was there, so I went straight out to
11 the -- where a vehicle pursuit had ended and the
12 suspect was taken into custody.

13 Q. At that point, did you search the
14 vehicle?

15 A. Yes, I did.

16 Q. I'm showing you State's 10 and 11. Do
17 you recognize those?

18 A. Yes, I do.

19 Q. What are they?

20 A. They're the vehicle driven by the
21 defendant.

22 Q. Did you find any evidence as a result of
23 your search of that vehicle?

24 A. Yes, I did.

25 Q. What was that?

1 A. A SouthTrust bank bag, a plastic
2 temporary, from the appearance, bank bag with money
3 in between the driver's seat and the middle
4 console. And, also, white gloves, like, cloth
5 gloves with rubber grips on the palm.

6 Q. And I want to talk about the bank bag
7 first, State's 12. Do you recognize that?

8 A. Yes, I do.

9 Q. What is that?

10 A. That's a rear shot of the front seat of
11 the vehicle where the bank bag is in the -- between
12 the driver's seat and the middle console.

13 Q. Okay. Now -- and regarding all of these
14 photographs, with the exception of State's 1, the
15 photograph of the defendant, all of these other
16 photographs we're dealing with, did you actually
17 take those pictures?

18 A. Yes, I did.

19 Q. Now -- and you took State's 12?

20 A. Yes, I did.

21 Q. And I'm showing you now State's 19. Do
22 you recognize that?

23 A. Yes, sir.

24 Q. Where was State's 19 found?

25 A. This one was found in -- this is the one

1 that was found in the vehicle in between the
2 driver's side and the middle console.

3 Q. Now, as part of State's 19, there's a
4 brown paper bag there with some writing on it. Is
5 that your handwriting?

6 A. Yes, it is.

7 Q. Did you actually put that item in that
8 brown paper bag?

9 A. Yes, I did.

10 Q. And did you mark it?

11 A. Yes, I did.

12 Q. And what did you write on there?

13 A. Empty plastic SouthTrust bank bag from
14 truck. Money returned to manager.

15 Q. And that's how you keep up with where you
16 collected these items of evidence?

17 A. Yes.

18 Q. Okay. Now, thank you, Detective. You
19 say you found some gloves from the truck?

20 A. Yes, I did.

21 Q. Where?

22 A. In the back compartment behind the second
23 seat in the storage area of the sport utility
24 vehicle.

25 Q. And I'm going to show you State's 22 as a

1 brown paper bag. First off, there's some writing
2 on it. Did you write that on there?

3 A. Yes, I did.

4 Q. And what's in the brown paper bag?

5 A. They're cloth gloves with the rubber --
6 rubber grips on the palm.

7 Q. And they appear to be in the same or
8 substantially the same condition as they were the
9 night you collected them?

10 A. Yes, they -- they appear --

11 MR. POWELL: We offer State's 22,
12 Judge.

13 THE COURT: Admitted.

14 (State's Exhibit No. 22 was admitted
15 into evidence.)

16 Q. Now, after you had searched the truck,
17 did -- were you called over to secure any other
18 items of evidence?

19 A. Yes, I was.

20 Q. What?

21 A. Some additional bank bags from -- from
22 Arby's.

23 Q. Okay. First off, I'm going to show you
24 State's 14 and 15, and ask if you recognize those?

25 A. Yes, I do.

1 Q. What are they?

2 A. They're two of the same -- correction --
3 three of the same plastic bags as in the previous
4 one. And then it looks like a leather -- I believe
5 it to be leather or --

6 Q. Detective, kind of hold up those two
7 exhibits in the same way you found them.

8 A. (Witness complies.) They were --
9 approximately, like this.

10 Q. Close together?

11 A. Yes, they weren't too far apart. They
12 were further apart than -- to -- for me to take a
13 picture of both of them so that we could still see
14 what they were. That's why I took them separately.

15 Q. Now, I'm going to show you State's 17,
16 18, and 20. Do you recognize those?

17 A. Yes, I do.

18 Q. What are they?

19 A. These are three SouthTrust bank bags with
20 Arby's written on them.

21 Q. Are those the same bank bags that were
22 shown in State's 15, a picture on them on the side
23 of the road?

24 A. Yes.

25 Q. And did you collect those?

1 A. Yes.

2 Q. And they appear to be in the same or
3 substantially the same condition as when you
4 collected them that night?

5 A. With the exception -- there were money --
6 there was money in it when I -- when we collected
7 them. That money was counted and turned over to
8 the manager.

9 Q. With the exception of the money?

10 A. With the exception of the money, they're
11 the same.

12 Q. You had to open them to get to the money?

13 A. Yes, sir.

14 MR. POWELL: We offer those, Judge.

15 THE COURT: Admitted.

16 (State's Exhibits No. 17, 18, and 20
17 were admitted into evidence.)

18 Q. State's 21, what is that?

19 A. That is the -- the other bank bag that
20 was located close to those three on Gunter Park
21 Drive.

22 Q. What's shown in State's 14?

23 A. That's the same bag.

24 Q. Okay. And it had money in it too?

25 A. Yeah, it had money as well.

1 Q. Other than the money, is that in the same
2 or substantially the same condition?

3 A. Yes, it is.

4 MR. POWELL: We offer that, Judge.

5 THE COURT: Admitted.

6 (State's Exhibit No. 21 was admitted
7 into evidence.)

8 Q. Now, were there any other items of
9 evidence that you went and collected from the
10 vicinity of Gunter Road and Congressman Dickinson
11 Boulevard?

12 A. Yes, there was.

13 Q. What were those?

14 A. They were a -- there was a mask or it was
15 a hood that was fashioned into a mask with a -- it
16 had the eyes and the mouth cut out, and -- yes,
17 that's it.

18 Q. I'm showing you State's 13.

19 A. Yes.

20 Q. Do you recognize that picture?

21 A. Yes, I do.

22 Q. Did you take it?

23 A. Yes, I took this picture.

24 Q. Picture of the mask?

25 A. Yes.

1 Q. And State's 16, what is that?

2 A. That is the -- the hooded mask or the
3 mask that was recovered from Gunter Park Drive
4 right at the intersection of Congressman Dickinson.

5 Q. And you actually picked this up?

6 A. Yes, I did, I collected that.

7 Q. And when you collected the bank bags and
8 the mask, were a Corporal Roberts and
9 Sergeant Higgins, respectfully, standing out there
10 by those items?

11 A. Yes, they were.

12 Q. And, to your knowledge, had anybody
13 tampered with anything or messed with anything or
14 put anything there that they didn't secure?

15 A. No.

16 Q. And going back to the evidence found in
17 the white truck, did anybody that you know of
18 tamper with that crime scene or place anything in
19 that truck?

20 A. No.

21 Q. Let's do this real quick. State's 1, do
22 you recognize that?

23 A. Yes, I do.

24 Q. What is it?

25 A. It is a booking photo of Mr. Smith that

1 was taken out at police headquarters in the
2 Detective Division.

3 Q. The night all this occurred?

4 A. The night that he was apprehended, yes,
5 sir.

6 Q. So that's the way he looked immediately
7 after this chase?

8 A. Yes, that is how he looked.

9 Q. And that's what he was wearing?

10 A. Yes, it was.

11 MR. POWELL: Judge, I'm not going to
12 offer this, but I'll -- never mind.

13 Q. That shirt he's got on there, y'all
14 collected that shirt?

15 A. Yes, we did.

16 Q. And y'all have it in evidence?

17 A. Yes.

18 Q. Now, I want to take you back now,
19 Detective, actually into the Arby's restaurant
20 itself. I've got a series of photographs here.
21 Let's start with State's 8 and 9. What are those
22 photographs of?

23 A. 9 is the rear door of Arby's that --
24 where the suspect made his escape. If you can see
25 on the ground here, there's a bar and that's a bar

1 that's used to help secure the door.

2 Q. And State's 8?

3 A. 8 is the safe behind the counter at
4 Arby's opened.

5 Q. Now, with the Court's permission, could
6 you step down? I want to spread these other
7 photographs out for the jury -- first of all, let
8 me get you to identify them and admit them into
9 evidence. Detective, flip through those four -- 2,
10 3, 5, 6, and 7. Do you recognize all of those?

11 A. Yes, I do.

12 Q. What are they collectively photographs
13 of?

14 A. The restroom area of Arby's, the Arby's
15 where the offense occurred.

16 Q. And did you take these?

17 A. Yes, I did.

18 Q. And are they fair and accurate of that
19 area?

20 A. Yes, they are.

21 MR. POWELL: We offer all these,
22 Judge.

23 THE COURT: Admitted.

24 (State's Exhibits No. 2, 3, 5, 6,
25 and 7 were admitted into evidence.)

1 Q. Now, I'm going to spread these out on the
2 jury rail. Now, Detective, what did you discover
3 when y'all looked into the bathroom at the Arby's?
4 What's significant about these photographs?

5 A. Well, upon looking into the bathroom, we
6 noticed -- you can see here, this is sheetrock type
7 insulation --

8 Q. You're referring now to State's 5?

9 A. 5 and --

10 Q. -- and 7.

11 A. 7. Also on top of the urinal as well,
12 which is 6. There's a -- few little pieces of
13 sheetrock that came from the ceiling.

14 Q. Okay. Now, what about State's 4, this
15 railing here, is there anything that appears to be
16 significant to you on that railing?

17 A. Yes, the railing is in the, where the
18 commode is, inside the stall. And there was a
19 sheetrock, what appeared to be a print of a boot or
20 shoe on the rail in what appeared to be sheetrock
21 or the --

22 THE COURT REPORTER: I'm sorry.
23 Sheetrock or what?

24 THE WITNESS: -- or the light.

25 Q. I want to refer you now, specifically, to

1 State's 2 and 3. What are these photographs of?

2 A. 2 is the ceiling tile. If you can
3 tell -- this tile here behind the light has been
4 raised. This was in the condition it was when I
5 first went in there and located it and saw it.

6 Q. We're not talking about a hole busted in
7 the ceiling?

8 A. No, no, not at all.

9 Q. Describe for the -- we've all seen this
10 kind of ceiling before. But describe to the jury
11 what kind of ceiling we're talking about.

12 A. It's a hanging ceiling tile that it sits
13 on a rail probably -- depending on where it is --
14 certain height from the ceiling -- from the actual
15 ceiling and --

16 Q. How do you get up in the ceiling?

17 A. You would push the tiles up and move them
18 over to get up into the ceiling.

19 Q. And that's what you observed here?

20 A. Yes. This is raised slightly. It wasn't
21 centered properly on the railing, the track that
22 the tile sits on.

23 Q. And State's 3, what's that a paragraph
24 of?

25 A. This is actually inside the ceiling under

1 the -- or above the tile.

2 Q. You removed the tile?

3 A. I pushed the tile out of the way to show
4 the space between where the tile was --

5 Q. Why were you doing that?

6 A. -- to show that there was enough room for
7 a person to get up in.

8 Q. Okay. Let me -- normally, does a person
9 sit on this type of drop ceiling?

10 A. No. And as you can see, there was wooden
11 braces up there.

12 Q. Now, after you examined the bathroom as
13 described in these series of photographs, as I
14 believe 2 through 7 -- have a seat, Detective?

15 A. (Witness complies.)

16 Q. Did you draw any conclusions from the way
17 you found the bathroom?

18 A. Yes. It was -- it gave the appearance of
19 someone --

20 MR. DURANT: Objection.

21 THE COURT: Just what your
22 observations.

23 Q. Yes. What were your observations about
24 the appearance of the bathroom?

25 A. With the -- with the way the tile wasn't

1 seated properly and with the material on the floor
2 and urinal. And on the railing, it looked like
3 somebody had been in the ceiling and climbed up and
4 climbed back down.

5 Q. Now, did you locate any other items of
6 evidence inside the actual Arby's restaurant
7 itself?

8 A. There was actually a videotape, but it
9 was nonfunctional. It was collected, but it was --
10 the video was nonfunctional.

11 Q. It didn't show anything?

12 A. No.

13 Q. It wasn't even working?

14 A. It wasn't working.

15 Q. Anything else?

16 A. No, sir.

17 Q. Did you attempt to take any fingerprints
18 or anything?

19 A. No, sir. The suspect was caught with the
20 property and also he was wearing gloves at the time
21 of the offense.

22 Q. Okay. So, aside from what you did at the
23 Arby's, securing the truck with the bank bag and
24 collecting the other items of evidence, are there
25 any other steps in this investigation?

1 A. No. Returning to headquarters and --
2 because of the evidence, place him into custody or
3 sign warrants.

4 MR. POWELL: I don't think I have
5 anything further, Judge.

6 THE COURT: Mr. Durant?

7 CROSS-EXAMINATION

8 BY MR. DURANT:

9 Q. Officer Butterbaugh, you said you seized
10 a bank bag and white gloves from the truck; is that
11 correct?

12 A. Yes, sir.

13 Q. How many -- how many pairs of white
14 gloves did you see in the truck?

15 A. It was approximately -- it was three
16 pairs.

17 Q. It was three pairs?

18 A. Yes, sir.

19 Q. And they were all -- were they all alike?

20 A. With the exception of the amount of dirt
21 and how -- the cleanliness of them, yes, they
22 appeared to be so.

23 Q. Did they appear -- did they appear to you
24 to be work gloves that somebody used in the regular
25 course of doing jobs and so forth?

1 A. Yes, as described by the witnesses.

2 Q. But it's not unusual for somebody to be
3 carrying around gloves in your car?

4 A. I can't advise.

5 Q. Pardon me?

6 A. I can't advise how many people carry
7 gloves in the car, sir.

8 Q. It's not unusual, is it?

9 A. I can't advise. I wouldn't think so.

10 Q. Okay. Thank you. And you said you went
11 to the Arby's at first; isn't that correct?

12 A. Yes.

13 Q. And then you went to the -- where the
14 chase had occurred?

15 A. To where it ended at, yes, sir.

16 Q. Where it ended. And you were the one who
17 collected, as you test -- collected the bags and so
18 forth that were -- that the -- the bags that were
19 found on the side of the road?

20 A. Yes, sir.

21 Q. Are police cars equipped with -- with
22 video cameras?

23 A. I believe some are and some aren't.

24 Q. And do you know whether this -- in this
25 particular incident whether the video was

1 operative?

2 A. I was advised that there was video. I --

3 Q. You were advised that there was video?

4 A. I haven't seen video of it, no, sir.

5 Q. You didn't see -- you didn't review it?

6 A. No, sir.

7 Q. As the case agent, you don't think that
8 that's something that would have been pertinent?

9 A. Mr. Smith was apprehended with the
10 evidence in his --

11 Q. Pardon?

12 A. -- possession, sir.

13 Q. I didn't --

14 A. Mr. Smith was apprehended with the
15 evidence in his possession.

16 Q. Yeah, but there was some question -- you
17 don't know -- do you know whether those bags were
18 thrown from the vehicle?

19 A. I wasn't in the pursuit, sir.

20 Q. Okay. But is it possible that the video
21 camera could have recorded those?

22 A. If the video was working and it was on
23 the vehicle light, I would imagine that it would
24 be. Like I said, I wasn't in the pursuit. I don't
25 know what angles --

1 Q. But -- but you -- but you were aware that
2 it was operative?

3 A. I was advised there was a video, yes,
4 sir.

5 Q. And you didn't review -- you didn't take
6 the diligence to review it, to see whether you
7 could pick up anything from that video?

8 A. There was no need to. The evidence was
9 in Mr. Smith's possession where --

10 Q. That that's what you say --

11 A. Yes, sir.

12 Q. -- it was in his possession?

13 A. Yes, sir.

14 Q. But couldn't that have sort of
15 supplemented whatever doubts that there might be
16 about where what -- where what was found and all of
17 that, if you had a video?

18 A. Sir, I saw where the evidence was with my
19 own eyes in the vehicle.

20 Q. And you said you took photo -- pictures
21 of the bathroom?

22 A. Yes, sir.

23 Q. And you said there was some kind of
24 residue from the fact that the ceiling was tampered
25 with? Isn't that what you testified was on the

1 floor?

2 A. Yeah, some sort of sheetrock like
3 material or the such.

4 Q. And you would -- would you say that
5 someone who was sweeping up the bathroom floor
6 would sweep that up before you had a chance to --
7 to see the debris on the floor? Do you understand
8 my question?

9 A. Um --

10 Q. If someone cleaned the bathroom, what you
11 found would not have been there? Is that -- isn't
12 that a fair statement?

13 A. Between when -- between when the robbery
14 happened and --

15 Q. The time --

16 A. -- when I went up there?

17 Q. The time that you took your photographs?

18 A. If someone cleaned it between when the
19 robbery occurred and when I went there, I would
20 imagine it wouldn't be there. I would imagine that
21 whoever cleaned would clean it up.

22 Q. Okay. You said that there was a foot --
23 you said there was a footprint --

24 A. It appeared to be.

25 Q. -- in the sheetrock?

1 A. Yes, sir, it appeared to be, sir.

2 Q. Okay. Did you -- did you try to get a --
3 a replica of that footprint and compare it to the
4 shoes that Mr. Smith was wearing?

5 A. Did I try to lift the shoe print off the
6 railing?

7 Q. Yes.

8 A. No, sir, I didn't try to lift the shoe
9 print off --

10 Q. Did you try to lift it off the sheetrock?

11 A. No, sir.

12 Q. Why?

13 A. There was no need to at the time, sir.
14 This was after we had determined that Mr. Smith had
15 the evidence in his possession.

16 Q. Okay. But don't you -- you know, in your
17 police investigation, don't you try to get all of
18 the evidence and more? Isn't that going to make
19 your case a little more airtight?

20 A. In this case, there was -- I didn't see a
21 way around it. It was tight -- the evidence was
22 tight. The bag said Arby's written in big letters
23 on the bag -- on the bag, the one that was found in
24 his possession in the vehicle that he was taken out
25 of by police.

1 Q. If the car was speeding -- and it's been
2 reported that the car was speeding up to eighty,
3 eighty-five miles an hour at different times and
4 bags were thrown. How -- how would those bags
5 necessarily land on the side of the road? Would
6 they -- would they have some velocity through it?

7 A. I'm not an expert on direct trajectory --
8 excuse me. I can't advise how they would land.

9 Q. But if they were thrown, they would have
10 a little bit of weight. Would you concur with me
11 that that -- that the chances of -- that the
12 chances were great that pursuing officers would
13 discern that, when something was thrown from the
14 window?

15 A. Sir --

16 MR. POWELL: Your Honor, we object.
17 to that question, ask him to speculate what --

18 THE COURT: Sustained.

19 MR. POWELL: -- other witnesses may
20 or may not have seen.

21 Q. Did you take a statement from -- did you
22 take -- were you involved in taking a statement
23 from the witnesses of the Arby's?

24 A. No, sir, that was my partner.

25 Q. And who is that?

1 A. Detective Harrison.

2 Q. Harrison?

3 A. Yes, sir.

4 Q. Do you have your file with you?

5 A. Yes, sir, I do.

6 Q. Could you find the statement given by
7 Ms. Atkins at the office?

8 A. The statement -- Mr. Powell has the
9 statements.

10 Q. Did you do an audio?

11 A. I didn't. No, I didn't, sir. That would
12 have been my partner.

13 Q. Did -- did your partner take audio
14 statements from all of the witnesses?

15 A. I believe so, yes, sir.

16 Q. And what are the headings of those
17 statements?

18 A. The headings?

19 Q. Yes.

20 A. Starts with voluntary statement form,
21 Montgomery Police Department, Division Detective
22 Bureau, Property, Date, 4/28/02.

23 MR. DURANT: Can I take a look at
24 those? May I approach?

25 THE COURT: Yeah. Come up here.

1 MR. POWELL: Your Honor, they're the
2 same statements we disclosed to Mr. Durant in --

3 MR. DURANT: I just wanted to --

4 THE COURT: You can look at them. I
5 don't know where you're going with this witness on
6 them.

7 THE WITNESS: May I?

8 MR. POWELL: Yeah. He's got it
9 already.

10 CROSS-EXAMINATION (continued)

11 BY MR. DURANT:

12 Q. And you're aware that none of -- none of
13 the people in Arby's were able to identify
14 Mr. Smith; isn't that correct?

15 A. By face. He was wearing a mask, sir.

16 Q. Okay. And did you say that you
17 personally found the bag in the -- in the jeep?

18 A. I recovered the bag.

19 Q. When you say you recovered it, what do
20 you mean?

21 A. Like, I collected it. I'm sorry. I
22 collected it and -- for chain of custody, I kept --

23 Q. Who --

24 A. The first officer -- Officer Koerner
25 advised that he thought there was a bag in there.

1 He saw a bag. At which point, I went in there,
2 collected the bag, saw that -- the Arby's written
3 in big letters on it. At which time, I collected
4 it and kept it in my possession until it was --
5 opened, the money counted, given to Mr. Bly who was
6 the manager and impounded the bag.

7 Q. Okay.

8 A. In our impound lot downstairs in the
9 bottom of the police station.

10 MR. DURANT: Okay. That's all.

11 THE COURT: Anything else?

12 MR. POWELL: Nothing further, Judge.

13 THE COURT: Okay. Come up here and
14 let me see where we are.

15 THE COURT REPORTER: Is everything
16 admitted, Meridith?

17 THE COURT REPORTER: I'm not sure
18 about 9.

19 MR. POWELL: Just for the Record,
20 Judge, we -- I think we've got State's 1 through
21 23. Everything has been identified, marked and
22 authenticated. We move to offer anything 1 through
23 23 that we haven't already.

24 THE COURT: Admitted.

25 (Anything not already admitted

1 State's 1 through 23 admitted.)

2 THE COURT: How many more witnesses?

3 MR. POWELL: At this time, the State
4 rest.

5 THE COURT: Okay. We're going to
6 take about a ten-minute break. And I'm hoping we
7 can get through with most of the testimony today.
8 If we had to go just a few minutes after five,
9 would it cause anybody a problem?

10 (Jurors nod.)

11 THE COURT: Okay. Hopefully, we
12 won't. But we'll get you in about ten minutes in
13 the jury assembly room.

14 (Out of the presence of the jury.)

15 THE COURT: At this time, the State
16 has rested. And, Mr. Durant, did you have any
17 motions?

18 MR. DURANT: The defense, at this
19 time, Judge, moves for a directed verdict based on
20 the fact that the State has not provided enough
21 evidence to tie my client in with this robbery.
22 And I don't believe that a prima facia case has
23 been proven in this incident.

24 THE COURT: Well, I've heard the
25 evidence, and I think a jury question is presented.

1 I'm going to deny your motion.

2 (Brief recess was taken.)

3 (In the presence of jury.)

4 THE COURT: Well, at this time, the
5 State's rested -- and I might add, you don't have
6 to go to the same chair unless you particularly
7 want to. But the State has rested at this time.
8 Mr. Durant --

9 MR. DURANT: I'll call Mr. Charles
10 Smith to the stand.

11 THE COURT: Mr. Smith, if you'll
12 come take the stand?

13 (Witness complies.)

14 THE COURT: And if you'll raise your
15 right hand.

16 CHARLES SMITH

17 The witness, having first been duly sworn or
18 affirmed to speak the truth, the whole truth, and
19 nothing but the truth, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. DURANT:

22 Q. Would you state your name for the ladies
23 and gentlemen of the jury, please?

24 A. Charles Smith.

25 Q. Mr. Smith, on April the 28th, where were

1 you in the early evening of that day -- in the
2 early evening of that particular date?

3 A. Well, in that -- that afternoon -- well,
4 evening, I was in Shorter, Alabama.

5 Q. Okay. What were you doing in Shorter?

6 A. I go to the track down there a lot -- dog
7 track.

8 Q. Do you recall when you left --

9 A. Yes, I do.

10 Q. -- the dog track?

11 A. Yes.

12 Q. Would you tell the ladies and gentlemen
13 of the jury the approximate time?

14 A. I always leave right at 11:00, 11:15.

15 Q. And when you left Shorter, which route
16 did you take?

17 A. I -- I come down Interstate -- I was on
18 85 headed -- coming west coming home.

19 Q. Coming back to Montgomery?

20 A. Coming back to Montgomery.

21 Q. And where did you turn off?

22 A. Oh, I turned off -- I got off Exit -- the
23 Mitylene Exit onto Atlanta Highway.

24 Q. Uh-huh. And where did you -- after you
25 got off on Mitylene and onto the Atlanta Highway

1 you said --

2 A. Uh-huh.

3 Q. -- where did you go?

4 A. I got -- I was still on Atlanta Highway,
5 and I was going -- I had needed me a can of skoal,
6 and I was going to stop at that BP right there on
7 Burbank, but I just made a u-turn up in the service
8 station. And I was going to that Entech up there
9 on that Northern Bypass.

10 Q. Did you -- did you go to the Entech?

11 A. No, I didn't have a chance to go to the
12 Entech.

13 Q. Okay. Let me ask you directly. Did you
14 ever go into that Arby's that evening?

15 A. No, I didn't.

16 Q. Did you have a gun on you that evening?

17 A. No, I didn't.

18 Q. Did you hold -- did you -- did you show a
19 weapon to anyone in the Arby's that evening?

20 A. No, I didn't.

21 Q. Were you in the vicinity of the Arby's?

22 A. I was on -- right at -- on the corner at
23 that BP service station. You've got the BP service
24 station and you've got the McDonald's next to it,
25 and then you've got the Arby's. I came back out

1 and made a right turn heading west --

2 Q. A west on what, Atlanta?

3 A. On -- headed west on Atlanta.

4 Q. Okay. Did there come a time that you --
5 that you realized that you were being followed?

6 A. Yes, I did.

7 Q. When did you first have an inkling or
8 when did you first discern that you were being --
9 when did you first realize you were being followed?

10 A. After I had come up out of the inter --
11 after I come up out of the service station and was
12 going down Atlanta, I got up about, um, right
13 there -- where is -- where the Red Lobster sitting
14 on the corner of Atlanta Highway and that service
15 road.

16 Q. Okay.

17 A. I was --

18 Q. Just off -- by the mall?

19 A. Yes, by the mall.

20 Q. Okay. And you -- you went down the
21 service road?

22 A. Yes, I turned down the service road
23 because I was going to the Northern Bypass over
24 there to the Entech.

25 Q. Uh-huh.

1 A. That's where I was going to get me a can
2 of skoal, because it was cheaper over there. And
3 I -- as I was going down the service road, I
4 observed a vehicle behind me.

5 Q. Okay. When you observed this vehicle
6 behind you, did you do anything? Did you decide
7 to -- you know, what did you do? Did you continue
8 on the same course?

9 A. I continued on the road. I went on up on
10 the Northern Bypass. I got to the -- you know,
11 you've got a light there, and I made a right turn
12 at the light. That's -- it's Twain Curve. From
13 Twain Curve to Oliver Road, I turned -- was going
14 down, and I slowed up. And the vehicle --

15 Q. Was the black vehicle still behind you?

16 A. I don't know what color it was. I -- but
17 I observed a vehicle still tailing me. I turned on
18 Oliver Road, went all the way up -- went all --
19 came all the way back around Oliver Road and come
20 to Plantation, turned to -- took a left on
21 Plantation, come back up to the Northern Bypass. I
22 slowed up a little.

23 Q. What were you -- were you -- were you --
24 what were you doing? Were you trying to see just
25 whether this person would continue following you?

1 A. Yes, I -- I'm trying to really figure out
2 what that person is doing following me. What is
3 it? Who is it? You know, because it scared me for
4 a minute. So I just slowed up, and I went on up to
5 the Northern Bypass. And I still kept looking in
6 my mirror back. I went across at the stop sign. I
7 went across over on the other side of the Northern
8 Bypass, and I took a left. I went back down to --

9 Q. Okay. Let me ask you this, Mr. Smith.
10 Did there come a time that police officers got
11 behind you?

12 A. Yes.

13 Q. And what junction was that? What
14 intersection -- what street did these officers get
15 behind you?

16 A. You have -- after I turned right there
17 on -- back up on the Northern Bypass, I went down
18 to the intersection again to -- I had passed
19 Entech, because it was closed. I went down to
20 Plantation. I took a right at the light, and I
21 went about twenty-five yards -- and I'm still
22 observing, you know, the vehicle behind me. And
23 that's when -- oh, about two or three seconds after
24 I seen -- I looked in my rearview mirror and seen
25 the lights. And I just panicked, because I -- I

1 know I ain't -- I don't have my insurance

2 Q. Okay. Let me ask you this. They put on
3 the emergency equipment. And why didn't you stop?

4 A. No, I didn't stop. I just panicked,
5 just -- because I know I didn't have my insurance.
6 I had just got a ticket, you know, driving without
7 insurance. I had just got a ticket about a week
8 later. So I just, you know, didn't know what to
9 do. I just kept on going.

10 Q. So why -- why did you keep -- why did you
11 keep on going for the next three or four miles?

12 A. I don't know. I just had to pull myself
13 together. But I wasn't speeding or nothing. I
14 just went down to the --

15 Q. Now, you've heard testimony that you were
16 traveling upwards of eighty miles an hour -- you
17 were traveling upwards of eighty miles an hour?

18 A. I don't think nobody in this -- in this
19 world can travel eighty miles an hour on the back
20 of Lagoon Park without flipping their car over.

21 Q. Okay. Did you -- did there come a time
22 that you felt comfortable or secure enough to stop?

23 A. Yes, I was -- I was going to -- I was
24 going to stop.

25 Q. Well, why didn't you stop before?

1 A. I was trying to get into some light --
2 wasn't no -- ain't no light down there.

3 Q. Why were you trying to get into some
4 light?

5 A. So I can -- when I stop, you know, police
6 and somebody can come by and see -- see me out
7 there talking to the police or the police -- so
8 they wouldn't jump on me or nothing.

9 Q. Okay. So you finally stopped, right?

10 A. I finally stopped.

11 Q. And you heard the testimony. Did you
12 immediately -- did you get out of your vehicle
13 right away?

14 A. Yes, I got out of my vehicle exactly when
15 he told me. I came out. He threwed the gun at me.
16 I had my hand up. And I had my door open and was
17 stepping -- was stepping out, and he -- one of them
18 ran into it, and I pulled up -- pulled my foot up
19 in time. He would have mashed it if I had left it
20 out there. He backed off of it and opened the
21 door, and I just politely got on out and laid on
22 the ground, because I know -- I didn't want them to
23 just kick me or do nothing like that, because I
24 know they'll do it.

25 Q. All right. So, you heard testimony also

1 that Officer Koerner said that he found a bag in
2 your -- in your truck. What is your response to
3 that?

4 A. After they arrested me and picked me
5 up -- they picked me up and put me in the back of
6 the patrol car. I'm sitting on the passenger side
7 in the back. My car is facing me. I know they got
8 the cameras up there. They -- they got the camera
9 of everything what's going on. I'm looking at it.
10 All the officers come around, was on the passenger
11 side of my vehicle. And I don't know did they --

12 Q. How many officers were -- what were they
13 doing? Were they searching your vehicle?

14 A. They didn't -- they weren't searching it
15 right then. They opened my door and pulled --
16 started pulling my -- the panels off, the back and
17 the side -- both my -- all my doors in my vehicle.

18 Q. Okay. And you heard testimony -- you
19 heard testimony that this SouthTrust bag was found
20 in your -- by -- between the driver's seat and
21 the --

22 A. Yes. I didn't have -- I didn't rob
23 nobody. I didn't have no bag in my vehicle. He
24 planted that bag in my vehicle. When I was sitting
25 down into the -- when I was sitting in the

1 officer's car, all of them come around there --
2 they've got the tape of it. They've got the tape
3 of it. I was -- you see all of them going around
4 there and just putting stuff in my vehicle. I
5 works out of my vehicle. That's why I have gloves.
6 I'm a plumber.

7 Q. Okay. How many pairs of gloves do you
8 carry around in your vehicle at any given time?

9 A. I probably have six or seven.

10 Q. Okay.

11 A. I also have tools in the back of my truck
12 too.

13 Q. Did -- you heard testimony also that they
14 found these bags. Did you, at any time, while you
15 were riding in that area, did you throw anything
16 out of your window?

17 A. No, I didn't.

18 Q. And I asked you again -- let me ask you
19 this. Have you been in trouble with the law?

20 A. Yes, I have.

21 Q. Did you -- have you ever done any time?

22 A. Yes, I have.

23 Q. You've been charged with robbery about,
24 what, twenty years ago, twenty-one years ago?

25 A. Twenty-one -- twenty years ago.

1 Q. Okay. And you haven't been in -- you
2 have not been in any trouble since that time, any
3 convictions since that time?

4 A. No, not in ten years.

5 Q. And it is your testimony here today that
6 you did not go into the Arby's?

7 A. I did not go in the Arby's.

8 Q. And you did not have a gun with --

9 A. I did not have a gun. If I had a gun,
10 they could -- they can get fingerprints. They can
11 take a DNA tests, do whatever they got to do.

12 MR. DURANT: Okay. That's all,
13 Judge.

14 CROSS-EXAMINATION

15 BY MR. POWELL:

16 Q. Mr. Smith, I'm showing you State's 10.
17 That is your truck, correct?

18 A. That's my vehicle.

19 Q. Okay. And you were in that that night?

20 A. (No response.)

21 Q. That's the car --

22 A. Yes.

23 Q. -- you were driving that night?

24 A. Uh-huh.

25 Q. Okay. And you were in the vicinity of

1 that Arby's? You're not denying that?

2 A. I said, I come -- I was, what, two
3 building over, because --

4 Q. Within two buildings --

5 A. Because I was at the BP service station.
6 Right there at the BP service station, you got a
7 McDonald's, then you got the Arby's.

8 Q. So Officer Johnson never saw you coming
9 out of there holding --

10 A. Didn't never see me coming out of there
11 holding nothing.

12 Q. Going to your car?

13 A. Going to my car.

14 Q. Now, what were you wearing that night?

15 A. I had on a pair of blue jean pants, Fubu
16 pants and a -- a slip over shirt.

17 Q. What kind of slip over shirt?

18 A. It was that hospital shirt.

19 Q. A green hospital scrub shirt?

20 A. Yes.

21 Q. The same kind the person inside the
22 Arby's was wearing?

23 A. Yes.

24 Q. Now, is this a picture of you that night?

25 A. Yes.

1 Q. And did you have a mustache that night?

2 A. Yes.

3 Q. And you shaved that off since then?

4 A. Uh-huh.

5 Q. So you don't look the same here today,
6 obviously, as you do in this photograph?

7 A. No.

8 Q. Now, when the police got behind you,
9 y'all did go through Gunter Park; is that right?

10 A. Yeah.

11 Q. You don't deny anything the officers said
12 about chasing all through Gunter Park and
13 everything like that, the route y'all --

14 A. No, I don't deny -- the only thing I
15 said, I said, ain't no man -- ain't no woman --
16 nobody going to ride through Gunter Park doing
17 eighty miles an hour or sixty miles an hour on that
18 back road.

19 Q. So this white jeep would have gone in the
20 proximity of where they found these two items in
21 the road?

22 A. I don't know. I don't know. I didn't
23 have -- it wasn't mine.

24 Q. Okay. And the white jeep would have gone
25 in the vicinity of where they located the bank bags

1 on the side of the road?

2 A. I don't know.

3 Q. Now, have you ever seen any of these bank
4 bags before?

5 A. No, I haven't.

6 Q. Never even laid eyes --

7 A. Are my fingerprints on them? Are my
8 fingerprints on them?

9 Q. Are these your gloves?

10 THE COURT: Listen to his question
11 and just answer it. If your attorney needs to
12 follow up something, he can.

13 Q. Now, have you ever seen any of these bank
14 bags before?

15 A. No -- no, sir.

16 Q. Would your fingerprints be on these bank
17 bags?

18 A. I don't know, sir. I've never seen them.

19 Q. Are these your white gloves?

20 A. Yes, sir.

21 Q. And you don't deny these white gloves
22 were in your jeep?

23 A. I got -- I should have about six or seven
24 pair in there.

25 Q. Now, if somebody is wearing these gloves

1 and they touched these bank bags, is that going to
2 leave any fingerprints?

3 A. I don't know. I'm not an officer.

4 Q. Now, have you ever seen State's 16
5 before?

6 A. No.

7 Q. So you've never seen this mask?

8 A. No.

9 Q. Do you know who cut these eye holes in
10 this mask?

11 A. I don't know who did it.

12 Q. Do you know whose mustache was sticking
13 out from the mouth hole of this mask?

14 A. No, I don't.

15 Q. Do you know whose green hospital scrub
16 shirt was underneath this mask?

17 A. No, I don't.

18 Q. Did you win anything at the track that
19 night?

20 A. No, I didn't, sir.

21 Q. How were you planning on paying for the
22 skoal?

23 A. I had four dollars and sixty cents in my
24 pocket.

25 Q. Is that all the money you had?

1 A. That's all I had.

2 Q. Did you make a decision that night that
3 maybe you needed some more money?

4 A. No.

5 Q. You --

6 A. I had enough to get some skoal.

7 Q. Did you have enough to keep living on the
8 rest of the month?

9 A. No. I works.

10 Q. When was your next payday?

11 A. The following weekend.

12 Q. Who do you work for?

13 A. I work for Bradley Plumbing and Heating.

14 Q. Bradley Plumbing --

15 A. Right there on Hackle Drive where I
16 parked my vehicle at.

17 Q. So you were parked by where you work?

18 A. Exactly.

19 Q. Now, did you park voluntarily or did you
20 park because --

21 A. I just parked because -- I said in my
22 mind there ain't no since in driving or putting
23 nobody on no high speed chase. I just stopped.

24 Q. So let me get this straight. Officer
25 Johnson is lying about seeing you outside the

1 building; is that right?

2 A. Yes.

3 Q. Okay. They're lying about how fast you
4 were going?

5 A. Yes.

6 Q. They're lying about whether or not you
7 ran stop signs?

8 A. Yes.

9 Q. They're lying about that sheriff's deputy
10 cutting you off, right?

11 A. I don't remember nobody cutting me off.

12 Q. Okay. Because you stopped voluntarily,
13 right?

14 A. I was right there -- I was right there on
15 Hackle Drive and Oliver Road --

16 Q. Okay.

17 A. -- right there on the corner at a stop.

18 Q. And it's your testimony that, despite the
19 fact that it's illegal and unethical and could get
20 one of the police officers fired, if not indicted,
21 he planted this evidence in your jeep to frame you
22 for committing this robbery?

23 A. Yes.

24 Q. Despite the fact that you were wearing
25 the same clothing and fit the same general

1 description as the person everyone described?

2 A. That's me.

3 MR. POWELL: Nothing further, Judge.

4 MR. DURANT: No further questions,
5 Judge.

6 THE COURT: Okay. You can step
7 down.

8 (Witness excused.)

9 THE COURT: Do you have any other
10 witnesses?

11 MR. DURANT: No, Judge. We rest.

12 THE COURT: And are you going to
13 have any rebuttal?

14 MR. POWELL: No, Judge.

15 THE COURT: Okay. At this time,
16 both sides have rested. So when you come back in
17 the morning, the attorneys will make closing
18 arguments, and then I'll instruct you on the law.
19 I'm going to ask if you could be here at 8:30. And
20 we'll get you in the jury assembly room. And if
21 anybody at home asks you about the case, just say
22 the Judge said I can't talk about it. So we'll see
23 you in the morning.

24 (Out of the presence of the jury.)

25 THE COURT: Before y'all leave,

1 let's go back over jury charges --

2 MR. POWELL: Yes, Judge.

3 THE COURT: -- briefly. I think I
4 understand the State's requesting circumstantial
5 and --

6 MR. POWELL: Circumstantial
7 evidence, robbery one, and the one on flight,
8 Judge.

9 THE COURT: Okay. And, Mr. Durant,
10 you had indicated you'll want identification?

11 MR. DURANT: Yes.

12 THE COURT: And I don't know of
13 anything else that would be applicable .

14 MR. POWELL: I don't either, Judge.

15 THE COURT: Okay.

16 MR. POWELL: Have they rested for
17 the Record?

18 MR. DURANT: Yes, we rested.

19 THE COURT: They have rested and you
20 have too.

21 MR. POWELL: And did he renew his
22 motion?

23 THE COURT: Yeah, and do you want to
24 renew your motion?

25 MR. DURANT: Yes.

1 THE COURT: And do you base it off
2 the same grounds?

3 MR. DURANT: Yes, Judge.

4 THE COURT: And, again, I've heard
5 the evidence, and I think a jury question is
6 presented, so I'm going to deny it.

7 (Off the Record discussion.)

8 THE COURT: Bring him back out.
9 Mr. Powell, it came up, during the course of
10 testimony, that one of the officers' cars had a
11 video camera. And I need to know, for the Record,
12 if the State's had the -- had the video in its
13 possession?

14 MR. POWELL: I -- Your Honor, I
15 first heard of the video today. I don't know if it
16 exists or if it's been recorded over or what the
17 status of it is. It wasn't in my case file. It
18 came out during conversations with the
19 detectives -- I mean with the patrol officers here
20 this morning, the Detective has it. I have no idea
21 whether the police department has it or not.

22 THE COURT: Well, it's never been in
23 the DA's possession?

24 MR. POWELL: No, never been in my
25 possession. And I was not aware of it until this

1 morning or until they started talking about it on
2 the witness stand.

3 THE COURT: Okay. Well, it's in the
4 Record for whatever it's worth.

5 MR. POWELL: And I have no idea if
6 they still even have it or not. I know how they
7 are about cycling through things and recording back
8 over. If the Detective doesn't come impound it and
9 take it from them and that kind of things, I have
10 no idea.

11 THE COURT: Well, I don't either and
12 neither do they.

13 MR. POWELL: And it's not listed on
14 the impound sheet in my file.

15 MR. DURANT: Judge, just for the
16 Record, I will say that, you know, the officers
17 have an obligation to tell the District Attorney
18 about such evidence. And the fact that they didn't
19 tell them, it's prejudicial to my client. And --

20 THE COURT: Well --

21 MR. POWELL: Subject to the -- I
22 mean, we can attempt to get it, Judge. I mean, I
23 know the defendant's claim was that there's
24 exculpatory material on that videotape, so I can
25 attempt to locate it in effort to, you know, in all

1 judicialness.

2 THE COURT: Why don't y'all be back
3 at eight in the morning? And anything else you
4 want to say in that regard, we can take up then.

5 MR. DURANT: Okay. Thank you.

6 (Break for the day.)

7 THE COURT: Yesterday, when we
8 broke, a matter had come up about the video -- a
9 videotape being used at the -- during or at the
10 scene of the crime. And, Mr. Powell, you were
11 going to see what -- make some effort to see what
12 could be done in that regard.

13 MR. POWELL: First off, Judge, just
14 to clarify, when we're talking about a videotape at
15 the scene, we're not talking about an evidence
16 technician coming out and doing any type of crime
17 scene --

18 THE COURT: Correct. This was from
19 a vehicle.

20 MR. POWELL: From a patrol vehicle
21 from their pursuit camera. I believe it was
22 Officer Koerner that verified that his pursuit
23 camera was functioning on that night. I then
24 contacted the case agent in the case,
25 Detective Butterbaugh and asked him to go back

1 through the course of events that night and go
2 through everything they had at the police station,
3 attempt to locate that videotape. Detective
4 Butterbaugh is en route, and he can describe for
5 the Court fully his efforts to locate that tape.
6 But my understanding is they were able to locate a
7 tape from Detective Koerner that had been labeled
8 4/27. We're not sure whether any of that is the
9 tape or not, because this occurred on 4/28. But
10 that tape had been -- had not been impounded but
11 had been recycled through the regular course of
12 police operations and no longer reflected any of
13 the actions of Officer Koerner on that tape. It --
14 I think he said the date that was on it was August
15 and it was another officer on there. So it had
16 been recycled, basically, and was never impounded.
17 for evidence whatever was on that tape.

18 THE COURT: Do you want to put
19 anything on the Record now or wait --

20 MR. DURANT: Judge, I'll put it now.
21 I just want to place on the Record the fact that
22 this -- this tape -- this purported tape came to my
23 attention while Officer Koerner was on the stand.
24 That's when my client told me that he knew that
25 there was a video -- a video camera in the car.

1 Because when he was placed in the patrol car, he
2 saw the video camera and -- calling to him and that
3 it was operative. I didn't have any knowledge
4 prior to that time that there was a video camera
5 that was operating.

6 THE COURT: Okay. Well, hopefully,
7 the Officer will be here --

8 MR. POWELL: In the next couple of
9 minutes, Judge.

10 (Brief recess was taken.)

11 MR. POWELL: One other thing, Judge.
12 And it's the State's position that the officers
13 testified yesterday fully and completely to the
14 events that occurred that night. And there has
15 been no predicate laid that there is anything on
16 that videotape other than what's been purported
17 that they testified to. Based on Officer Koerner's
18 testimony of the events that occurred during the
19 pursuit and the scene, which all the other
20 officers, who have testified, same the -- exactly
21 the same thing. And anything else, just disputed
22 fact of witness credibility for the jury.

23 MR. DURANT: Well --

24 THE COURT: Well, it concerned me
25 enough to see if the video could be located. And,

1 again, for the Record, the DA did not have it and
2 was not aware of it until yesterday either --

3 MR. POWELL: Correct.

4 THE COURT: -- so --

5 MR. POWELL: And Detective
6 Butterbaugh can further explain the police
7 procedures that were or were not followed in this
8 videotape being recycled or whatever.

9 MR. DURANT: I just want to make it
10 clear, and maybe this is understood -- but I want
11 to -- just want to clarify it -- that does not --
12 the fact that -- the circumstances of which the
13 tape is not available does not preclude the defense
14 from arguing in closing --

15 THE COURT: No. You can argue
16 anything that was presented as evidence during the
17 trial of the testimony. And, of course, whatever
18 is said at this hearing would not be evidence. I'm
19 doing it more for the Record, just to be sure that
20 there is not any evidence that needs to be --
21 available that needs to be turned over.

22 (Brief recess was taken.)

23 (In the presence of Detective
24 Butterbaugh.)

25 THE COURT: Raise your right hand.

1 DETECTIVE C. J. BUTTERBAUGH

2 The witness, having first been duly sworn or
3 affirmed to speak the truth, the whole truth, and
4 nothing but the truth, testified as follows:

5 THE COURT: Go see what jurors are
6 here, if they're all here, and let them know -- go
7 ahead.

8 MR. POWELL: Do you want me to
9 question --

10 THE COURT: Yes.

11 MR. POWELL: Okay.

12 DIRECT EXAMINATION

13 BY MR. POWELL:

14 Q. Again, state your name for the Record?

15 A. C. J. Butterbaugh.

16 Q. Now, Detective Butterbaugh, yesterday
17 during testimony and as we were discussing the case
18 with the patrol officers, it came to our attention
19 that one of the patrol -- sorry -- one of the
20 patrol units, a video camera was operational; is
21 that correct?

22 A. Yes, sir.

23 Q. Describe, briefly, what kind of camera
24 we're talking about.

25 A. It's an in car camera that's in a patrol

1 vehicle that focuses on the front of the car --
2 right in front of the windshield.

3 Q. Okay. Which patrol officers' car had
4 that camera operating?

5 A. It was Officer Koerner.

6 Q. Okay. Now, yesterday afternoon, at the
7 Court's request, I contacted you, did I not?

8 A. Yes, sir.

9 Q. And did you attempt to locate any video
10 from that patrol car?

11 A. Yes, I did.

12 Q. And describe for the Court the results of
13 those findings.

14 A. I was not able to locate a video.
15 Apparently, it was taken from Officer Koerner's car
16 and secured. At which point, we found a videotape
17 that was labeled Koerner with the date, and after
18 putting it, we reviewed it and the date on the
19 video was in August of this year. So, apparently,
20 the tape had been recycled.

21 Q. Okay. Now, what -- how does that purport
22 with operating procedures with the police
23 department?

24 A. That's patrol procedure. I'm not sure
25 how patrol usually does -- does that. But it seems

1 from -- once a tape is full or taken out of the
2 video and secured, and then when another tape runs
3 out, they'll find one and replace it.

4 Q. Is it standard procedure to recycle these
5 tapes unless it's specifically impounded --

6 A. Yes, it is.

7 Q. -- for evidentiary purposes?

8 A. Yes.

9 Q. And was that done in this case?

10 A. Yes, it was.

11 Q. It was impounded in this case?

12 A. No, it was recycled.

13 Q. It was recycled in this case?

14 A. Yes.

15 Q. So we have no idea what was or wasn't on
16 the video other than what the officers testified
17 to?

18 A. Yes.

19 Q. Now, was there any intent, that you
20 became aware of through the course of attempting to
21 locate this, to destroy or alter the contents of
22 that videotape?

23 A. No.

24 Q. In other words, this was just a mistake?

25 A. Yes, it appears.

1 Q. And the only evidence again we have of
2 what may or may not have been on that videotape is
3 what people saw out there that night?

4 A. Yes, sir.

5 THE COURT: Mr. Durant, do you have
6 any questions?

7 CROSS-EXAMINATION

8 BY MR. DURANT:

9 Q. Mr. Butterbaugh, is -- these videotapes,
10 are they ever reviewed? Is there any reason -- any
11 particular reason that might dictate that they will
12 be reviewed?

13 A. Yes, I imagine that there would be.

14 Q. Okay. And this particular case, you
15 didn't see any need to review or impound this tape?

16 A. I, myself, no, I didn't --

17 Q. Did you see the tape?

18 A. No, myself, I didn't review it or impound
19 it, no.

20 MR. DURANT: That's all, Judge.

21 THE COURT: Any --

22 MR. POWELL: One more question.

23 REDIRECT EXAMINATION

24 BY MR. POWELL:

25 Q. So, as far as you know, just somebody

1 took the tape out of Officer Koerner's camera and
2 stuck it out on a shelf somewhere, and then it got
3 recycled?

4 A. As best of my knowledge, yes.

5 MR. POWELL: Nothing else, Your
6 Honor.

7 THE COURT: Well, based on that, I'm
8 going to specifically find that there hasn't been
9 any evidence withheld from the defendant. And it
10 appears to the Court that that would be a normal
11 operation. So, we'll get the jury in just a
12 moment.

13 And are y'all ready on a worker's comp?

14 (Brief recess was taken.)

15 (In the presence of the jury.)

16 THE COURT: You can be seated.
17 Yesterday, when we broke at the end of the day, you
18 know both sides have rested, and now the attorneys
19 will address you in open -- closing arguments. And
20 the State goes first, then the defendant, and then
21 the State has an opportunity if they want to reply.
22 And then I'll charge you.

23 Are you ready?

24 MR. POWELL: Yes, Your Honor. May
25 it please the Court, Mr. Durant?

1 Members of the jury, good morning. Thank you
2 for your attention yesterday. The State and
3 Mr. Smith greatly appreciate the attention you paid
4 to the evidence in this case. But, as you can
5 see -- and the State's position, this is a
6 straightforward case. We have a situation where a
7 man dressed in a green scrub shirt with some
8 identifiable facial features; mainly, this bushy
9 mustache, goes into Arby's with a gun, lines up
10 three employees on their knees, threatening them
11 with a gun, holding the gun to their head while he
12 makes them open a safe and load bags of money, and
13 then runs out into a white jeep, and that results
14 in a police chase, where they catch him in that
15 jeep with bank bags from the robbery inside the
16 jeep. And they have not only the physical
17 evidence, State's 19, but photographic evidence of
18 the way the evidence was found in the jeep. And
19 there is no evidence, whatsoever, that anything
20 happened different from the way the patrol officers
21 said other than the defendant's testimony.

22 Now, the Court is going to tell you, you can't
23 just disregard the defendant's testimony. But, as
24 jurors in this case, y'all are the sole judges of
25 the credibility. Who are you going to believe in

1 this case? Are you going to believe a story that
2 the defendant told you about officers planting
3 evidence and attempting to frame him? Are you
4 going to believe the testimony of thrée scared Arby
5 employees when they describe a man the same size
6 and shape and build of the defendant wearing the
7 exact same clothes of the defendant with the exact
8 same facial features of the defendant and the exact
9 same car as the defendant's when property from the
10 robbery was found in the car. All of the evidence
11 stacks up and points to the defendant beyond any
12 reasonable doubt.

13 And the Judge is also going to tell you, as
14 jurors, you can employ your good old fashion common
15 sense on what happened in this case. Members of
16 the jury, this is simple. He went in. He stuck up
17 employees and he got caught red-handed because
18 Officer Johnson was right there in the area and
19 Trudale Jackson flagged him down. He threw bank
20 bags out the window. The police recovered the bank
21 bags, and he was caught with a bank bag still in
22 the car.

23 Now, I'm sure Mr. Durant is going to get up
24 here and talk to y'all about fingerprints or the
25 lack of fingerprints. Well, members of the jury,

1 he was wearing gloves. He's going to talk to you
2 about videotapes or where is the videotape from the
3 patrol car. If -- you're the jury. If you want to
4 decide the fact that the State didn't play a
5 videotape from the patrol car as reasonable doubt,
6 that's your prerogative to do so.

7 But to find that to be reasonable doubt, you
8 have to choose to not believe the testimony of
9 those police officers that told you what they saw
10 out there. You have to question what they were
11 telling you to the extent where this video would
12 rise to the level to make you not believe that
13 Officer Koerner and Officer Butterbaugh found this
14 bank bag in the car and took this picture. It just
15 doesn't make sense that they would put their career
16 and their livelihood and their reputation on a line
17 just to frame this one random defendant. That
18 doesn't make any sense. That's the story of a
19 desperate man, who robbed an Arby's and got caught
20 red-handed.

21 The State's evidence is simple and it's
22 overwhelming. And, after you have heard all this
23 evidence, we've proven our case beyond a reasonable
24 doubt. The testimony, the pictures, the physical
25 evidence, find Charles Smith guilty of armed

1 robbery. Thank you.

2 THE COURT: Mr. Durant?

3 MR. DURANT: May it please the
4 Court, Mr. Powell?

5 That is the job that you're faced with this
6 morning. That's the job that jurors are always
7 faced with, to ascertain the truth. You've heard
8 both sides of the story. And you've heard the
9 eyewitnesses. And as I mentioned to you yesterday
10 morning -- and that's why I spent so much time to
11 underscore the importance of the presumption of
12 innocence because -- as I said to you, the
13 presumption of innocence still abides and it abides
14 until you go in there and you resolve this case one
15 way or the other. And you have that at one end and
16 at the other end you have the question of
17 reasonable doubt.

18 Reasonable doubt. And there is -- you know,
19 you sit here and you heard the testimony. And if
20 there is anything that creates a reasonable doubt
21 in any of your -- in any of you, that's it -- any
22 of you, there are twelve of you, and you have to
23 reach a unanimous verdict in this case. But I
24 suggest to you that if any one particular person
25 has found that there is a reasonable doubt, that's

1 enough. That I have some doubt -- not just some
2 doubt, but a reasonable -- a reasonable doubt.

3 Now, you've heard -- you sat here and you
4 heard the eyewitness, and not one individual -- not
5 one -- and let me hasten to add that you cannot
6 blame them -- but not one individual was able to
7 conclusively identify -- identify my client, not
8 one single individual. And if a person had a mask
9 or something fashioned into a mask or whatever, so
10 be it. That could not identify him. It is easy to
11 come out here and say after the fact that that
12 person looked like A or that person looked like B
13 or that person looked like C. But I don't -- it is
14 my position that I don't -- I don't believe that a
15 mustache is as such a distinctive characteristic to
16 extrapolate that, okay, this person has a mustache
17 or this person is heavy set, so it must be you.
18 You just don't make those extrapolations. You just
19 don't.

20 And the witnesses testified they were scared.
21 No question about that. They were scared. And who
22 wouldn't be under those circumstances? And it's
23 for the very reason that they were scared that I
24 would undermine their ability to make a positive or
25 a partial -- or even a partial identification. You

1 know, it's -- it's -- it's not unheard of. But
2 studies have shown over and over again that
3 eyewitness identification is one of the weakest
4 form of identification, because you put people into
5 that situation, a gun, life being threatened.

6 The studies have shown that folks -- folks
7 are --

8 MR. POWELL: Your Honor, we're going
9 to object to Mr. Durant's references to these
10 studies that are outside the evidence.

11 THE COURT: I'm going to sustain.

12 MR. POWELL: Move to strike and ask
13 the Court to --

14 MR. DURANT: Well --

15 MR. POWELL: -- instruct the jury to
16 disregard.

17 THE COURT: Well, the jury has heard
18 the evidence. And, of course, your verdict must be
19 based on the evidence presented in Court.

20 Go ahead.

21 MR. DURANT: We submit that when
22 someone is faced with a gun that it detracts on
23 that person's ability, as I said, to focus on
24 facial features, and, especially, when those
25 features are covered.

1 You heard Mr. -- you heard Mr. Smith testify,
2 and he said that he was coming from the dog track.
3 And the Judge is going to instruct you, you're the
4 ultimate Judge of this testimony. But the Judge is
5 going to instruct you that you can't disregard his
6 testimony. You have to put his testimony with the
7 other witnesses and you have to weigh that
8 testimony. You cannot say, Well, I don't believe
9 that. And that is why I place so much emphasis on
10 the fact that whether you would believe police
11 testimony over a civilian or a defendant's
12 testimony. His testimony is entitled to be weighed
13 equally with the other testimony in this case.

14 And he testified that there was a car behind
15 him. And this car -- and you heard that testimony,
16 so I don't think that there is any disparity here
17 in as far as the testimony is concerned. He
18 testified that the car was behind him. The Officer
19 testified that he was following in an unmarked car.
20 This is not something that you can -- that anyone
21 would know -- maybe another police officer can
22 determine that oh, there goes a K-9 unit. But the
23 regular civilian population is not attuned to that
24 unless, of course, they see the dog in the back of
25 the car, and you might reach that conclusion.

1 But he was following, and he said he was
2 afraid. Well, you know, again, this is something
3 you're going have to use your common sense. If
4 somebody -- if you had not done anything and
5 somebody is following you, who wouldn't be afraid?
6 Who wouldn't be afraid if a car is following them
7 for miles and miles? Those are things that you
8 have to take into consideration. I mentioned that,
9 because even after the -- the patrol units got
10 involved, here is a person who is already
11 petrified, is in a desolate area, it's after
12 midnight, and he doesn't know what is going to
13 happen.

14 And this -- and this chase -- this pursuit
15 ensues. He didn't stop, and he told you why he
16 didn't stop. Now, you and now me, we might have
17 stopped. You know, you might -- people make
18 different decisions, different judgments when
19 they're faced with these situations. But the fact
20 is he said that he didn't have any insurance, that
21 his license had been suspended in the past, and he
22 didn't want to -- to be faced with the same
23 situation. And now you might -- you might very
24 well look at that and say, Oh, I don't know about
25 that. But, again, that was his judgment. That was

1 his experience. That's his experience.

2 Now, some of you would probably never have
3 that kind of experience. The police are after you
4 and you stop and you give them everything and you
5 cooperate. But some people, because of their
6 experiences, don't do that. And I'll leave that up
7 to you to make that final determine -- that final
8 determination, whether that was reasonable. You
9 have to look at it in its totality.

10 You've already -- you -- I might jump around a
11 little bit in this closing -- but you heard the
12 testimony about the ceiling. And you heard one
13 Officer testify that there was debris around and
14 there were -- there was a footprint. You know, my
15 position is this. If you are going to do a
16 thorough job -- and I believe that the Montgomery
17 Police Department, for the most part, does a good
18 job -- but if you're going to do a thorough job,
19 you're going to take everything -- everything,
20 because this is a serious charge. You're going to
21 take everything, and you're going to lift
22 footprints, and you're going to, you know --
23 purportedly, they got the person that did this as
24 far as they were concerned -- so, purportedly, he
25 still had on the same shoes, so don't look at

1 things you're going to do.

2 If you can't -- if -- if -- the position of
3 the police department is that he had on gloves,
4 and, therefore, you couldn't lift any fingerprints.
5 You saw -- and it's -- this case is clear that he
6 saw an impression on a piece of sheetrock, so lift
7 that footprint. You know, they can do it and
8 compare it to the shoes that the -- the alleged
9 defendant was wearing. That's simple. I asked the
10 detective -- you heard me ask him -- he said that
11 wasn't necessary. But I don't -- I don't see why
12 that wasn't necessary. It's a cumulative -- a
13 cumulative impact of evidence that makes the
14 difference. Evidence stacked upon evidence. It's
15 never too much. And you heard the defendant
16 testify, he said, Well they -- they converged upon
17 you. Well, that's the judgment of police. I
18 think -- I don't know know about any problems with
19 that. They converged upon me. And they -- even
20 one incident, they almost came to slamming the door
21 on his foot. And he said that that's the reason he
22 did not get out of the car immediately. That's
23 believable. That's believable. Because when --
24 when they -- when they come upon you, you know,
25 they have their fears too, and they're not being

1 nice about it. They're not being nice about it.

2 Officer -- Officer Koerner testified -- and

3 you heard me ask him, he said he had a video

4 camera. And the video camera -- asked him if the

5 video camera was operative, and he said, yes, it

6 was operative. And I would imagine that a video

7 camera caught something -- caught something of this

8 chase. You know, you heard that this chase was

9 eighty miles -- eighty-five, ninety sometimes. And

10 you heard my client testify, and I think -- I think

11 it's believable. You can't -- you know, he matter

12 of factly said, you couldn't be driving no ninety

13 miles an hour in that area. And you heard him also

14 testify that the turns were not exactly ninety --

15 ninety-degree turns, but at least eighty to

16 eighty-five. And if somebody is going eighty or

17 ninety miles an hour, you know, I believe those

18 cars are going to turn over. And then he sustained

19 speed, going -- making those kind of turns. So

20 you -- it's questionable whether the car was going

21 that fast. It's questionable.

22 One officer testifies when he saw the car, it

23 was within the speed limit. But another officer,

24 prior to that testimony, testified that it was

25 above the speed limit, the officer who was in the

1 unmarked car said it was above the speed limit and
2 testified that he was running stop signs. Well,
3 you know, again, that's up to you to determine,
4 rather that my client said, No, I didn't run any
5 stop signs. It's up to you to determine that.

6 The -- the situation with what the defendant
7 was wearing, you know, sometimes there are
8 situations -- and I think we all -- and that's why
9 you've got to use your common sense. I think we
10 all experience situations where you say, Wow, if
11 that -- if it weren't for so and so, I could have
12 been -- this could have happened, because it was so
13 incoincidental that I was there and I was -- I was
14 wearing this or I was doing this. You know, it
15 happens. It happens. We don't know really -- I
16 wasn't there. You weren't there. But you've got
17 to make a decision. We don't know really what
18 happened after whoever robbed the place. What
19 happened when that person left the back door, we
20 don't know. But it would -- but it seems to me
21 that it took some time before this person
22 supposedly pulled off from the parking lot. From
23 the testimony I heard, I believe I could conclude
24 reasonably that that person would have been long
25 gone. Folks don't dillydally when they've

1 committed a robbery. They get out there and they
2 get it and they're gone. You know, most of the
3 times they have a person waiting for them ready to
4 pull off. But, you know, you've got to put it in
5 context. And you can't disregard his testimony
6 because he's the defendant, and he might seem
7 guilty to you. Worse things have happened and
8 people have not been guilty.

9 Now, they had a -- two officers testified
10 about the video being operative, but Officer
11 Butterbaugh and Officer Koerner, who was the driver
12 of that patrol car, said it was operative. Again,
13 I say just like the footprint, bring -- bring that
14 tape in here. Bring that tape in here. It was
15 operative. Nobody said, Well, you know, it was
16 turned off. The defendant testified that he could
17 look at it and see that it was operating. You
18 know, you've got to bring -- you've got to bring --
19 you've got to wrap a case up. You can't do -- you
20 cannot do it, you know, halfheartedly and said,
21 Well, this is enough and this -- you know, this is
22 what -- convict him. You've got to do everything
23 in your investigation. That's the way you
24 should -- so that your decision today -- your
25 decision today would be made easier. If you could

1 look at the videotape showing the chase and,
2 possibly -- I am not saying this conclusively --
3 but, possibly, showing that something being thrown
4 from the window. This car is behind. The
5 camera -- the camera aims in that direction. So it
6 would -- it would have reflected. I'm not saying
7 that it -- that it was a must, but it would have
8 reflected maybe something. You know, you see -- if
9 you saw that, I wouldn't be making this argument to
10 you this morning, because you could easily say,
11 Yes, I saw something thrown. I don't know what it
12 was. I saw this chase, and, therefore, this is
13 what happened.

14 You know, I don't stand here before you today
15 and condone any robbery. It is -- it is awful that
16 they have to endure what they endured. But, at the
17 same time, it's incumbent on the police officers to
18 get the right person. It is incumbent. And
19 there's enough doubt in this case, you know,
20 debris. The fellow who cleaned up the bathroom
21 said he didn't see anything. The officer
22 testified, yeah, there was sheetrock down on the
23 floor. I think there's even a question as to what
24 was going on when -- you know, where this person
25 came from. They said they went into the

1 bathroom -- Oh, well, I guess -- of course, they'll
2 say that the person must have been up in the
3 ceiling, because they didn't see anybody in the
4 bathroom.

5 The defendant testified he didn't have -- they
6 retraced the steps, and you heard all about that.
7 They went in there and found some bags. We don't
8 know when those bags got out there. We don't know
9 who preceded my client in that area. One bag was
10 found in the car -- in the truck. The defendant
11 said he didn't know anything about the bag. And,
12 obviously, you could say that about folks and say,
13 of course, he'll say that. And I'm not, you know,
14 going to pay any attention -- you know, if that's
15 your conclusion, I can't -- I -- it's too bad I
16 can't convince you otherwise. But I don't think
17 it's far-fetched. I don't think it's far-fetched.

18 And you have to use your common sense. You're
19 going to have to use your everyday knowledge about
20 what goes on in police investigations. You're
21 going to have to do it. Now, some people has got
22 different -- some people have different
23 experiences, and they'll probably say, huh-uh.
24 Because if your experience is different, of course,
25 your conclusion in this case would be different.

1 If your experience is, you know, folks don't do
2 this and folks don't do that. But it happens. And
3 all I ask you is to give it a fair hearing. I ask
4 you not to summarily just say huh-uh. Police
5 officers don't do this and police officers don't do
6 that, because, you know, it happens. It happens.

7 I ask you to really consider the things that I
8 have discussed with you here this morning. I think
9 if you'll approach it in the manner that I have
10 delineated, I think that you would find that
11 there's reasonable doubt -- reasonable doubt in the
12 sense that there is no firm eyewitness
13 identification. The Judge is going to tell you
14 about eyewitness identification -- which is another
15 thing I want you to pay close attention as the
16 Judge instructs you is circumstantial evidence --
17 circumstantial evidence. You can be convicted on
18 circumstantial evidence, but, please, pay close
19 attention to what the Judge says when she gives the
20 instruction of circumstantial evidence and how it
21 must preclude any other inference. Listen to that.
22 And I think if you listen to that and have an open
23 mind -- and that's why I ask you to keep an open
24 mind -- and you have an open mind, I don't think
25 you're going to have any problem in returning a